No. 80-5902

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1980

BRENDA J. DePRIEST,

Appellant,

VS.

COMMISSIONER ROBERT J. BIBLE
TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY,

and

COMMISSIONER SAMMIE LYNN PUETT,
TENNESSEE DEPARTMENT OF HUMAN SERVICES,

Appellees.

ON APPEAL FROM THE MIDDLE SECTION OF THE

COURT OF APPEALS OF THE STATE OF TENNESSEE

MOTION IN THE ALTERNATIVE TO DISMISS APPEAL

OR AFFIRM JUDGMENT

Counsel of Record

MICHAEL E. TERRY
Deputy Attorney General
450 James Robertson Parkway
Nashville, TN 37219
Phone (615) 741-2640

OF COUNSEL:

WILLIAM M. LEECH, JR.
Attorney General

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QUESTIONS PRESENTED

Whether T.C.A. § 50-1324(A) as applied to an employee of the State of Tennessee is violative of the First Amendment to the United States Constitution where the employee voluntarily chose to accept employment with the State of Tennessee with actual knowledge of the annual, sick and special leave provisions of state government service and flagrantly disregarded those provisions and left her employment and became unemployed as a result of her actions.

TABLE OF AUTHORITIES

Braunfeld v. Brown,
366 U.S. 599, 81 S. Ct. 1144,
6 L. Ed. 2d 563 (1960). 6

Hildebrand v. Unemployment Insurance Appeals Board,
19 C.3rd 765, 140 Cal. Rptr. 151,
566 P.2d 1297 (California Supreme Court,
1977) cert. denied, 434 U.S. 1068,
98 S. Ct. 1247, 55 L. Ed. 2d 770 (1978) 4,5

Sherbert v. Verner,
374 U.S. 398, 83 S. Ct. 1790,
10 L. Ed. 2d 965 (1963) 4

OPINIONS BELOW

The Opinions below are set forth in the appellant's jurisdictional statement.

Jurisdiction

The jurisdictional requisites are adequately set forth in the appellant's jurisdictional statement.

Constitutional and Statutory Provisions

Pertinent Constitutional and Statutory provisions are set forth in the appellant's jurisdictional statement.

STATEMENT OF THE CASE

The Appellant, Brenda J. DePriest, was employed by the Tennessee Department of Human Services as a secretary I from January to October, 1978. She was dismissed from employment on October 23, 1978 because of her irregular attendance record and the fact that she had been on unauthorized leave since October 13, 1978. The Appellant, a member of the Worldwide Church of God, took the unauthorized leave in order to participate in an eight day religious holiday - the "days of rest".

As a newly hired state employee, the Appellant as a matter of right acquired both one annual day and one day of sick leave for each month of state service. The Appellant took advantage of these leave days and used up, of her own volition, all of her annual and sick leave days accumulated during her term of state service. In addition, the appellant had also requested and been granted three other special leave days (leave without pay).

In September, 1978, just a short time before the Appellant's "days of rest" were to begin, she requested additional special leave in order to observe the holiday. Her employer

denied her request since the office she was in had a skeleton staff at the time and her absence would have caused great difficulty. The Appellant then voluntarily chose to observe the "days of rest" in spite of the denial of her request for additional special leave. As already stated, she was dismissed from employment on October 23, 1978.

The last two paragraphs of the Appellant's Statement of the Case accurately reflect what occurred after the Appellant applied for unemployment compensation benefits on October 25, 1978.

THE QUESTION IS NOT SUBSTANTIAL

The appellant concedes that the issue presented is not a novel one, but it is also not a substantial one. The appellant tries to equate the instant case with Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) when it is clear that the case which is most nearly on point is Hildebrand v. Unemployment Insurance Appeals Board, 19 C.3rd 765, 140 Cal. Rptr. 151, 566 P.2d 1297 (California Supreme Ct., 1977) cert. denied, 434 U.S. 1065. Sherbert involved an unemployment benefits claimant who allegedly refused without good cause to accept available suitable work. Here, as in Hildebrand, the question involves the legality of a statute which denied unemployment benefits to a claimant who had already accepted employment and then left, in the wording of the statute, "voluntarily without good cause".

Although the appellant tries to picture Hildebrand as a minority decision, it is actually a reflection of the better view. As the Hildebrand court itself stated:

> . . . cases from states having comparable statutory provisions [involving the voluntarily without good cause requirement] have held uniformly that one who knowingly accepts employment involving a condition which subsequently proves unsatisfactory cannot thereafter claim 'good cause' for voluntarily terminating that employment because of later unwillingness to continue to meet the condition. [Emphasis added]. (See Department of Industrial Relations v. Scott, (1951) 36 A.a.App. 184, 53 So. 2d 882, 884; Oliver v. Creamer Heating & Appliance, (1966) 91 Idaho 312, 420 P.2d 795, 799; Friloux v. Administrator, Division of Employment Security of D & L, (La. 1962) 136 So. 2d 99, 101; In re Sellers (1961) 13 A.D.2d 204, 215 N.Y.S.2d 385, 387; Lirakis v. Unemployment Compensation Board of Review, (1961) 194 Pa. Super. 342, 168 A.2d 647, 648). The applicable principles were well expressed in Friloux, as follows:
>
> 'To constitute good cause the circumstances attending the final

> termination of the employment . . . must be compelling and necessitous and *not merely because the applicant is dissatisfied with conditions that he well knew existed at the time he accepted employment.'* (P. 101, italics added.)
>
> In other words, an employee cannot ' . . . take a job and use that job for the necessary qualifying period of employment and then, *for no reason not present in the first instance,* voluntarily quit and receive unemployment insurance benefits.' (In re Sellers, supra, 215 N.Y.S. 2d at p. 387, italics added.).
>
> While conceding that the foregoing cases do not involve termination of employment for religious reasons, we conclude that the underlying rationale of those cases is equally persuasive here within a different context.

Hildebrand v. Unemployment Insurance Appeals Board, supra, 566 P.2d at 1300.

The Appellant's jurisdictional statement attempts to show that T.C.A. § 50-1324(A) placed the appellant in the position of either violating a cardinal provision of her religious beliefs or refusing to violate those beliefs and being fired without unemployment benefits. Actually, the predicament of Appellant was entirely of her making. Her employer had provided her with more than enough annual leave and sick leave days to attend the "days of rest" with no problem. However, she had voluntarily expended all her leave and sick days. She could have avoided this litigation entirely by simply allocating her days off differently. Thus, the issue the Appellant raises is a question of personal priorities. If the "days of rest" were as important to the appellant as she contends, then it behooved her to save leave days, even if that involved some sacrifice to herself. The State has not infringed the Appellant's civil rights. She has simply created a predicament herself and she should not now be allowed to complain about the forseeable consequences of her actions.

The appellant further contends that where there is a legitimately held religious belief as to the time period involved, the First Amendment should protect a worker's right to worship at one time as well as another, and there is consequently no difference between a week of holy days and an annual holy day. The Appellant's contention would mean that whenever a person with such a legitimately held belief somehow managed to get a job, he or she would be constitutionally entitled to avoid work on those days, and to receive unemployment compensation benefits if fired. This Court should not approve such a construction. In previous cases this Court has faced this issue and declined to follow the route which appellant offers. As stated by Mr. Chief Justice Warren in the case of Braunfeld v. Brown, 366 U.S. 599, at 606-7, 81 S. Ct. 1144, at 1147-48, 6 L. Ed. 2d 563, at 568 (1960):

> . . . it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment . . .

For these reasons, the question is not substantial and this Court should deny jurisdiction or in the alternative affirm the lower court.

MICHAEL E. TERRY
Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, TN 37219
Phone (615) 741-2640